



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215 and 252

[Docket DARS-2018-0008]

RIN 0750-AJ19

Defense Federal Acquisition Regulation Supplement: Only One Offer (DFARS Case 2017-D009)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to partially implement a section of the National Defense Authorization Act for Fiscal Year 2017 that addresses the requirement for additional cost or pricing data when only one offer is received in response to a competitive solicitation.

DATES: Effective July 31, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the *Federal Register* at 83 FR 30656 on June 29, 2018, to partially implement section 822 of

the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328) to: (1) address the potential requirement for additional cost or pricing data when only one offer is received in response to a competitive solicitation; and (2) make prime contractors responsible for determining whether a subcontract qualifies for an exception from the requirement for submission of certified cost based on adequate price competition. This DFARS rule supplements the Federal Acquisition Regulation (FAR) final rule published under FAR Case 2017-006, which modified the standards for adequate price competition at FAR 15.403-1(c) for DoD, National Air and Space Administration (NASA), and the Coast Guard (FAC 2019-03, 84 FR 27494). Section 822 excludes from the standard for adequate price competition the situation in which there was an expectation of competition, but only one offer is received. Three respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments is provided, as follows:

A. Summary of Significant Changes from the Proposed Rule

There are no significant changes from the proposed rule in the final rule in response to the public comments. However, changes

were required at 252.215-7010, in order to conform to changes in the FAR final rule relating to elimination of the terms "responsive" and "viable."

B. Analysis of Public Comments

1. Effectiveness and efficiency of the acquisition process.

Comment: Several respondents indicated that the requirement for certification of cost or pricing data and potential submission of additional data when only one offer is received in response to a competitive solicitation would burden the effectiveness and efficiency of the acquisition process and delay timely execution. This may also delay subcontract competitions, requiring restart of the procurement process when only one offer is received for a subcontract.

Response: This rule is implementing the requirements of section 822 of the NDAA for FY 2017. DoD has no flexibility to remove the certification requirement from the rule, since it is required by statute.

2. Competition.

Comment: One respondent noted that it is the expectation of offers that produces the competitive environment.

Response: This rule is implementing the requirements of section 822 of the NDAA for FY 2017. The Government cannot project with certainty which solicitations will receive multiple offers or only one offer. Furthermore, even though a

solicitation is issued competitively, the Government does not know whether the single offeror expected competition.

3. Evaluation of subcontractors.

Comment: One respondent was concerned that contractors may take on more evaluation risks to avoid finding suppliers unacceptable, in order to avoid a situation in which only one viable and responsible offer is received.

Response: DoD has no flexibility to change the basic requirements of the rule, since it is required by statute. Furthermore, such behavior would indicate poor business judgment. If the contract contains the clause at FAR 52.244-2, Subcontracts, then the contractor must also comply with the clause at DFARS 252.244-7001, Contractor Purchasing System Administration, which includes the following requirements:

- Paragraph (c)(10) requires timely and adequate cost or price analysis and technical evaluation for each subcontractor and supplier proposal or quote to ensure fair and reasonable subcontract prices.
- Paragraph (c)(20) requires that the contractor provide for an organizational and administrative structure that ensures effective and efficient procurement of required quality materials and parts at the best value from responsible and reliable sources.

4. Commercial items.

Comment: One respondent stated that paragraph (3) of the clause at DFARS 252.215-7010 should also state that the offeror is responsible for determining the commercial item exception at FAR 15.403-1(c) (3), because the Conference Report for section 822 stated that the Senate Bill contained a provision that would clarify the definition of competition and the role of the prime contractor in determining whether a subcontract meets the competitive or commercial test under the section.

Response: DoD has fully implemented the law as enacted. Section 822 does not address determinations with regard to commercial items.

Comment: Another respondent stated that the proposed rule should apply to contracts and subcontracts for commercial item acquisitions.

Response: Both the provisions at DFARS 252.215-7009 and 252.215-7010, are prescribed for use in solicitations using FAR part 12 procedures for the acquisition of commercial items. However, the changes required in this rule will not affect acquisition of commercial items, because 10 U.S.C. 2306a(b) (1) (B) provides that submission of certified cost or pricing data shall not be required in the case of a contract, a subcontract, or modification of a contract or subcontract for the acquisition of a commercial item. Determination of whether items are commercial items is outside the scope of this rule.

5. Only expected to receive one bid.

Comment: One respondent stated that the rule was a step in the right direction, but considered that the rule did not implement the statutory language stating that certified cost or pricing data must be supplied by contractors in circumstances where DoD "only expected to receive one bid." The respondent was concerned that shifting the focus of the rule to "if only one offer is received" could prevent DoD from obtaining that vital information during the award phase and could create obstacles to obtaining the information at a later date.

Response: Section 822 added the phrase "that is only expected to receive one bid" at 10 U.S.C. 2306a(a)(1)(A), which now reads as follows: "An offeror for a prime contract under this chapter to be entered into using procedures other than sealed-bid procedures *that is only expected to receive one bid* shall be required to submit cost or pricing data before the award of a contract if-..." [followed by cost or pricing data thresholds]. The exceptions at 10 U.S.C. 2306a(b) still apply, including the exception for adequate price competition. Section 822 also modified the standard for adequate price competition, an exception to the requirement for certified cost or pricing data, to require that the agreed upon price is based on adequate competition that results in at least two or more responsive and viable competing bids.

This DFARS rule must be read in conjunction with the changes made under FAR Case 2017-006, Exception from Certified Cost or Pricing Data Requirements—Adequate Price Competition. That final FAR rule made amendments to the standards for adequate price competition at FAR 15.403-1(b), stating first what is common to all agencies, and then making the standard relating to expectation of competition applicable only to agencies other than DoD, NASA, and Coast Guard. In stating the common requirements, the final FAR rule also did not use the terms “responsive” and “viable,” but expressed the requirements using the existing FAR terminology, i.e., “Two or more responsible offerors, competing independently, submit priced offers that satisfy the Government’s expressed requirement.”

FAR 15.403-4 requires as follows: “Unless an exception applies, certified cost or pricing data are required before accomplishing any of the following actions expected to exceed the current threshold ... The award of any negotiated contract...”. Adding “If the contracting officer only expects one bid, unless an exception applies...” would be without effect, because whether or not the contracting officer expects one bid or multiple bids, if only one bid is received, that is determinative of the requirement for submission of certified cost or pricing data. If multiple bids were received from two or more responsible offerors, competing independently, that satisfy the Government’s

expressed requirement in accordance with FAR 15.403-1(c)(i), despite an erroneous expectation to the contrary, then that would constitute an exception (on the basis of adequate price competition) and no certified cost or pricing data would be required. The offeror does not provide the certificate of current cost or pricing data until agreement on price is reached, at which time it would be known how many offers had been received. According to FAR 15.406-2(e), if certified cost or pricing data are requested by the Government and submitted by an offeror, but an exception is later found to apply, the data shall not be considered certified cost or pricing data and shall not be certified.

C. Other Changes.

This final DFARS rule has made changes from the proposed rule at DFARS 252.215-7010(c)(3) in both the basic clause and Alternate I. For simplicity, the final FAR rule does not use the terms "responsive" and "viable," but expresses the requirements of section 822 using existing FAR terminology, as a requirement that is applicable to all agencies at 15.403-1(c)(1)(i)(A), i.e., "Two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement." In addition, due to the restructuring of FAR 15.403-1(c)(1), the FAR reference at both cites was changed to FAR 403-1(c)(1)(i).

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not create a new provision, but amends the existing provisions at DFARS 252.215-7008 and 252.215-7010. Although the existing provisions apply to solicitations for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items, the changes due to this rule do not impact the acquisition of commercial item, including COTS items, because the rule retains the exceptions to the requirements for certified cost or pricing data relating to acquisition of commercial items. In addition, DFARS 252.215-7010 already applies to contracts valued at or below the simplified acquisition threshold, while DFARS 252.215-7008 does not.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of

promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This final rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

The reason for this rule is to further implement section 822 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328) to address the potential requirement for certified cost or pricing data when only one offer is received in response to a competitive solicitation, if no other exception to the requirements for certified cost or pricing data applies. This DFARS rule supplements the final rule published under FAR Case 2017-006 (FAC 2019-03, 84 FR 27494), which modified the standards for adequate price competition at FAR 15.403-1(c) for DoD, NASA, and the Coast Guard.

The objective of this rule is to implement the new more restrictive standard for "adequate price competition" as the

basis for an exception to the requirement to provide certified cost or pricing data. The statutory basis is 10 U.S.C. 2306a, as amended by section 822 of the NDAA for FY 2017.

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis.

According to data for FY 2016 from the Federal Procurement Data System, for DoD, there were 918 noncommercial, competitive new awards valued at greater than \$750,000 (the certified cost or pricing data threshold) that were awarded on the basis of a solicitation that received only one offer. Of the 918 awards, 549 were awarded to small businesses and 369 were awarded to other than small businesses. DoD estimated the number of small entities to which the rule will apply as follows:

- Of these awards, all will require certification, but only 75 percent (277) may require additional data.
- When additional certified cost or pricing data are requested from the prime contractor, it will impact 1,836 subcontract awards; 1,505 to small businesses.
- 75 percent of the subcontract awards to small business (1,129) will be required to provide new certified cost or pricing data, and 25 percent (376) will only be required to certify the cost or pricing data previously provided.

DoD will now be required to obtain certified cost or pricing data from an offeror when only one offer is received, and no other exception applies. DoD estimates 1.3 responses per respondent, with an average of 55.5 hours per response. The average level of the entities completing these responses is estimated as equivalent to a Government General Schedule 12, step 5 employee.

DoD was unable to identify any alternatives that would reduce burden on small business and still meet the requirements of the statute. Impact on small businesses is lessened, because the requirement for certified cost or pricing data only applies to acquisitions that exceed \$750,000 and there is an exception for the acquisition of commercial items, including COTS items.

VII. Paperwork Reduction Act

This rule contains information collection requirements that have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. chapter 35). This information collection requirement has been assigned OMB Control Number 0704-0574, entitled "Defense Federal Acquisition Regulation Supplement (DFARS) Part 215; Only One Offer and Related Clauses at 252.215."

List of Subjects in 48 CFR Parts 215 and 252

Government procurement.

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Jennifer Lee Hawes,

*Regulatory Control Officer, Defense Acquisition Regulations
System.*

Therefore, 48 CFR parts 215 and 252 are amended as follows:

1. The authority citation for 48 CFR parts 215 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 215—CONTRACTING BY NEGOTIATION

2. Revise section 215.371-3 to read as follows:

215.371-3 Fair and reasonable price and the requirement for additional cost or pricing data.

For acquisitions that exceed the simplified acquisition threshold, if only one offer is received when competitive procedures were used and it is not necessary to resolicit in accordance with 215.371-2(a), then then the contracting officer shall comply with the following:

(a) If no additional cost or pricing data are required to determine through cost or price analysis that the offered price is fair and reasonable, the contracting officer shall require that any cost or pricing data provided in the proposal be certified if the acquisition exceeds the certified cost or pricing data threshold

and an exception to the requirement for certified cost or pricing data at FAR 15.403-1(b) (2) through (5) does not apply.

(b) Otherwise, the contracting officer shall obtain additional cost or pricing data to determine a fair and reasonable price. If the acquisition exceeds the certified cost or pricing data threshold and an exception to the requirement for certified cost or pricing data at FAR 15.403-1(b) (2) through (5) does not apply, the cost or pricing data shall be certified.

(c) If the contracting officer is still unable to determine that the offered price is fair and reasonable, the contracting officer shall enter into negotiations with the offeror to establish a fair and reasonable price. The negotiated price should not exceed the offered price.

(d) If the contracting officer is unable to negotiate a fair and reasonable price, see FAR 15.405(d).

3. Amend section 215.408 by—

a. Revising paragraph (3);

b. In paragraph (5) introductory text, removing “required” and adding “required or when using the provision at 252.215-7008” in its place; and

c. In paragraph (7) introductory text, removing “FAR 52.215-20” and adding “252.215-7010” in its place.

The revision reads as follows:

215.408 Solicitation provisions and contract clauses.

* * * * *

(3) Use the provision at 252.215-7008, Only One Offer, in competitive solicitations that exceed the simplified acquisition threshold, including solicitations using FAR part 12 procedures for the acquisition of commercial items.

* * * * *

PART 252-SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Amend section 252.215-7008 by-

- a. Removing the provision date "(OCT 2013)" and adding "(JUN 2019)" in its place;
- b. Revising paragraph (a);
- c. Removing paragraphs (b) and (d);
- d. Redesignating paragraph (c) as paragraph (b);
- e. In the newly redesignated paragraph (b), adding a paragraph heading and removing "225.870-4(c)" and adding "DFARS 225.870-4(c)" in its place; and
- f. Adding a new paragraph (c).

The revision and additions read as follows:

252.215-7008 Only One Offer.

* * * * *

(a) *Cost or pricing data requirements.* After initial submission of offers, if the Contracting Officer notifies the Offeror that only one offer was received, the Offeror agrees to-

(1) Submit any additional cost or pricing data that is required in order to determine whether the price is fair and reasonable or to comply with the statutory requirement for certified cost or pricing data (10 U.S.C. 2306a and FAR 15.403-3); and

(2) Except as provided in paragraph (b) of this provision, if the acquisition exceeds the certified cost or pricing data threshold and an exception to the requirement for certified cost or pricing data at FAR 15.403-1(b) (2) through (5) does not apply, certify all cost or pricing data in accordance with paragraph (c) of DFARS provision 252.215-7010, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, of this solicitation.

(b) *Canadian Commercial Corporation.* * * *

(c) *Subcontracts.* Unless the Offeror is the Canadian Commercial Corporation, the Offeror shall insert the substance of this provision, including this paragraph (c), in all subcontracts exceeding the simplified acquisition threshold defined in FAR part 2.

* * * * *

5. Amend section 252.215-7010 by—

a. In the basic provision—

i. Removing the provision date of "(JAN 2018)" and adding "(JUN 2019)" in its place; and

- ii. Adding paragraph (c) (3);
- b. In the Alternate I clause—
 - i. Removing the provision date of “(JAN 2018)” and adding “(JUN 2019)” in its place; and
 - ii. Adding paragraph (c) (3).

The additions read as follows:

252.215-7010 Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.

* * * * *

(c) * * *

(3) The Offeror is responsible for determining whether a subcontractor qualifies for an exception from the requirement for submission of certified cost or pricing data on the basis of adequate price competition, i.e., two or more responsible offerors, competing independently, submit priced offers that satisfy to Government's expressed requirement in accordance with FAR 15.403-1(c)(1)(i).

* * * * *

Alternate I. * * *

(c) * * *

(3) The Offeror is responsible for determining whether a subcontractor qualifies for an exception from the requirement for submission of certified cost or pricing data on the basis of adequate price competition, i.e., two or more responsible

offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement in accordance with FAR 15.403-1(c)(1)(i).

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